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CHARLES ELMORE CROPLEY

In The Supreme Court of The United States

OCTOBER TERM, 1944

No. 462

J. F. FITZGERALD CONSTRUCTION COMPANY,
Petitioner,

vs.

CHRIS PEDERSEN, *Individually and as Agent and Representative for and in behalf of himself and all employees of the defendant similarly situated,*
Respondent.

BRIEF ON BEHALF OF PETITIONER, J. F. FITZGERALD CONSTRUCTION COMPANY

HENRY E. FOLEY,
Counsel for Petitioner

Dated: January 6, 1945

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PRIOR OPINIONS

The opinion of the Court of Appeals of the State of New York of June 14, 1944, (R. 63-65) is reported in 293 N. Y. 126.[1] The decision (without majority opinion) of the Appellate Division, Third Department, of the Supreme Court of the State of New York, of November 18, 1943, (R. 51-58) is reported in 266 App. Div. 1032. The opinion of the

[1] The order of said Court amending its remittitur is set forth in the Appendix hereto and a certified copy is on file with the Clerk of this Court.

Supreme Court of the State of New York of May 21, 1943, (R. 42-47) is unreported. The per curiam opinions of this Court, of February 8, 1943, and March 8, 1943, respectively, are reported in 318 U. S. 740 and 318 U. S. 742, respectively.

The prior decision (without opinion) of said Court of Appeals (R. 27) is reported at 288 N. Y. 687; the prior opinion of said Appellate Division (R. 20-22) is reported at 262 App. Div. 665; and the prior opinion of said Supreme Court (R. 12-15) is reported at 173 N. Y. Misc. 188.

JURISDICTION

The statute involved is the Fair Labor Standards Act of 1938 (29 U. S. Code sec. 201 et seq.), the pertinent provisions of which are set forth in an appendix hereto.

The jurisdiction of this Court herein is based upon section 237 (b) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. Code sec. 344 (b)). This Court, on December 18, 1944, granted your petitioner's petition herein for certiorari. (R. 66)

QUESTIONS PRESENTED

Your petitioner seeks consideration and review of the following questions:

(1) Whether the entry of judgment for the plaintiffs[2] by the Supreme Court of the State of New York on the record before it (which wholly fails to show the nature of the work done by any plaintiff at any time, and which shows merely that your petitioner entered into a contract for the reconstruction and repair of certain bridges of an interstate carrier and that the plaintiffs, together with others, were employed by

[2] The terms "plaintiff" and "plaintiffs" as here and hereinafter used mean the plaintiff, Pedersen, and those persons on whose behalf he is suing, and who are the respondents in this proceeding.

your petitioner "in doing work" under that contract) is in conflict with the decisions of this Court and constitutes a violation of the prior mandate of this Court.

(2) Whether interest may be added to the statutory double damages in making an award to employees in an action under Section 16 (b) of the Fair Labor Standards Act of 1938.

STATEMENT OF THE CASE

The judgment for the plaintiffs, review of which is sought in this proceeding, was entered by the Supreme Court of the State of New York upon remittitur from the Court of Appeals of said State, in an action for the recovery of overtime compensation and liquidated damages alleged to be due by virtue of the provisions of the Fair Labor Standards Act of 1938 (29 U. S. Code sec. 201 et seq.).

The action was tried, pursuant to stipulation, on an agreed statement of facts in lieu of proof (R. 9), and findings were made by the Trial Judge (R. 15-17), in accordance with said agreed statement, of which the following are pertinent to this proceeding:

"That The New York Central Railroad Company, as lessee of the Boston and Albany Railroad, operated trains between the States of New York and Massachusetts over four bridges located on the railroad right-of-way in the Town of Chatham, Columbia County, New York."

"That in September 1938, abutments supporting two of said bridges were completely washed out and destroyed and the substructures of the other two bridges were damaged by a flood."

"That thereafter, the railroad company entered into a contract with the defendant,[3] an independent contractor

[3] The term "defendant" as used in these quotations means the petitioner herein.

engaged in general construction work, for the construction of entirely new abutments under the two bridges where the abutments had been washed out and destroyed, as aforesaid, and for repairing the substructures of the other two bridges which had been damaged, as aforesaid."

"*That defendant employed plaintiffs, together with other individuals, as its employees in doing work under said contract* and paid them at the rates per hour, as shown on Schedule 'A' annexed to said stipulation of December 1, 1939."

"That after October 24, 1938, until the completion of said work by the defendant under said contract, *each plaintiff worked for the defendant* the number of hours per week and was paid by the defendant at the hourly rate of pay as shown on Schedule 'A' annexed to said stipulation of December 1, 1939." (Italics supplied.)

No finding was made, and nothing in the record warranted a finding, as to the particular work done for your petitioner by any plaintiff in any week or at any time.

After trial, the complaint was dismissed upon the merits by the Trial Court (R. 18), and the dismissal was sustained first by the Appellate Division of the Supreme Court (R. 18-19) and thereafter by the Court of Appeals (R. 27) on the ground that, as your petitioner was engaged in local construction work not constituting interstate commerce, none of the plaintiffs could have been engaged in commerce.

After the filing by the plaintiffs in this Court of a petition for certiorari to review said judgment of dismissal, this Court rendered its decision in *Overstreet* v. *North Shore Corporation*, 318 U. S. 125 (1943), establishing as erroneous the ground underlying the decisions, hereinbefore referred to, of the New York courts (namely, that the nature of the employer's business, rather than the nature of the employees' activity, was controlling). Thereupon,

this Court, without hearing argument, entered an order directing that said judgment of dismissal of the Supreme Court of the State of New York "be, and the same is hereby reversed with costs on the authority of *Overstreet* v. *North Shore Corporation*, 284, decided February 1, 1943", and that "this cause be, and the same is hereby remanded to the said Supreme Court for further proceedings not inconsistent with the opinion of this Court". (R. 29-30) (318 U. S. 740)

Your petitioner then filed in this Court its petition for rehearing wherein your petitioner pointed out:

1. That under the construction of the Act by this Court in the *Overstreet* decision, recovery depends upon the particular work which a plaintiff has done and whether such work is so closely related to commerce "as to be in practice and in legal contemplation a part of it";

2. That, on the record herein, the particular work done by any plaintiff does not appear and that, therefore, a determination is impossible that the activity of any plaintiff was at any time so closely related to commerce "as to be in practice and in legal contemplation a part of it".

Upon consideration of your petitioner's application for rehearing, this Court amended its mandate by adding, after the direction that the cause be remanded for further proceedings not inconsistent with the opinion of this Court, the following caveat:

"and without prejudice to a determination of the nature of the employment of any members of the class on whose behalf this suit has been brought." (R. 30) (318 U. S. 742)

Notwithstanding the decision of this Court in the *Overstreet* case and the mandate of this Court, and notwithstanding the absence of any evidence as to "the nature of

the employment of any members of the class on whose behalf this suit has been brought", the plaintiff moved in the Supreme Court of the State of New York for summary judgment *upon the original record* in these proceedings, being the record which this Court had previously considered. The Supreme Court granted the plaintiff's motion for summary judgment and included interest on the double damages allowed. (R. 42) The Supreme Court was sustained in its action first by the Appellate Division, Third Department, (R. 51) and then by the Court of Appeals. (R. 63) On remittitur from the Court of Appeals, the order and judgment of that Court were made the order and judgment of the Supreme Court of the State of New York. (R. 62)

Thereupon, your petitioner filed in this Court its petition for certiorari and on November 6, 1944, this Court granted said petition, but limited said grant only to the interest issue presented.

After the entry of said order, the plaintiff having contended in its brief filed in opposition to the granting of certiorari that:

> "The only issue determined by the State courts, and the only issue presented to this Court, is one of civil procedure. *The petitioner herein could easily have required of the plaintiff*, (Pedersen) *proof of the details of each worker's duties*, by merely interposing on the motion for summary judgment a short answering affidavit." (P. 9) (Italics and parenthetical insertion supplied),

your petitioner filed in the Court of Appeals of the State of New York a petition seeking amendment of the remittitur of said Court so that said remittitur would state more explicitly the ground of decision and more fully reveal that, in issuing said remittitur, said Court had necessarily passed upon a question of federal law.

On December 2, 1944, the Court of Appeals granted your petitioner's motion and ordered its remittitur amended by adding thereto the following:

> "Upon this appeal there was presented and necessarily passed upon a question of interpretation of a Federal statute, the Fair Labor Standards Act of 1938. The decision of this Court that respondents have established their right to recover benefits under said Act is based upon the sole ground that the agreed statement of facts states a prima facie case in that it shows that the respondents were employed in doing work under the appellant's contract for the repair of an instrumentality of commerce, and therefore that the appellant had the burden, which it failed to sustain, of going forward with evidence to show the contrary."[4]

Thereupon, your petitioner filed herein a petition for rehearing and, on December 18, 1944, this Court granted said petition and also your petitioner's petition for certiorari without limitation. (R. 66)

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[4] A certified copy of the order amending said remittitur has been filed with the Clerk of this Court and a copy of said order is set forth in an Appendix hereto.

SUMMARY OF ARGUMENT

I. *No plaintiff is entitled to recovery on the record herein.*

A. No plaintiff is entitled to recover unless, during the periods for which he seeks overtime compensation, he was engaged in commerce or in activity so closely related to commerce "as to be in practice and in legal contemplation a part of it". Engagement by employees, themselves, in "commerce" as that term is used in the Fair Labor Standards Act of 1938 is a prerequisite to recovery under the Act. (29 U. S. Code s. 207 (a); *A. B. Kirschbaum Company* v. *Walling*, 316 U. S. 517; *McLeod* v. *Threlkeld*, 319 U. S. 491). No claim is of course made that any plaintiff herein was engaged in the "production of goods for commerce," and no plaintiff was "engaged in commerce" as that term is used in the Act unless he would have been held to have been employed in "commerce" as that term is used in the Federal Employers' Liability Act, that is unless his individual activity was in or "so closely related to the movement of commerce as to be a part of it." (*Overstreet* v. *North Shore Corporation*, 318 U. S. 125; *McLeod* v. *Threlkeld*, 319 U.S. 491).

B. The record herein is wholly devoid of evidence that any plaintiff was in any week or at any time engaged in "commerce" or in activity "so closely related to the movement of commerce as to be a part of it." The record shows only that your petitioner was engaged in a project calling for the repair of an instrumentality of commerce and that the plaintiffs, *together with others*, "worked" for your petitioner. On such a project, certain activity, if performed by the plaintiffs, would constitute engagement by them in "commerce" and considerable other activity, if performed by the plaintiffs, would necessarily not constitute such engagement. No showing was made, and nothing enables a determination, of the particular work done by

any plaintiff in any week or at any time, and hence it is impossible to determine on the record whether, for example, any plaintiff (as distinguished from other employees not parties to the suit) actually performed any repair work (which would be within the coverage of the Act), or performed instead only incidental, preliminary or salvaging work (which, under the test of coverage laid down in the *Overstreet* and *McLeod* decisions, constitutes employment which is neither commerce nor "so closely related to the movement of commerce as to be a part of it").

C. The burden of proving coverage under the Act is on the party asserting coverage (*Warren-Bradshaw Drilling Company* v. *Hall*, 317 U.S. 88; *Super-Cold Southwest Company* v. *McBride*, 124 F. (2d) 90; *Schwarz* v. *Witwer Grocer Co.*, 49 F. Supp. 1003, affirmed in 141 F. (2d) 341; *Jones* v. *Springfield Missouri Packing Company*, 45 F. Supp. 997). This burden the plaintiffs have wholly failed to sustain. The record is wholly barren of evidence as to the activity of any plaintiff at any time or as to the closeness of the relation of such activity to the movement of commerce. The Court of Appeals erred in holding that the burden of going forward shifted to your petitioner. The burden of going forward does not shift from the party having the burden of proof until such party has produced sufficient evidence to sustain his burden as a matter of law. This the plaintiffs have not done. The record merely shows that the plaintiffs *might* or *might not* have been engaged in commerce. The plaintiffs have failed to establish their case and should have been denied relief.

II. *Interest cannot properly be added to statutory double damages in making an award to employees under the Act.*

A. The Act not only contains no provision for an award of interest but, by direct implication, excludes such an

award. The detailed provisions of the Act indicate that all compensable damage is provided for therein. The Act deals fully and in detail with the measure of recovery (29 U. S. Code s. 216 (b)) and makes no provision for interest. (*Campbell* v. *Zavelo*, 243 Ala. 361). Interest is in fact intentionally not provided for because of the double damages provision. Double damages are awarded to take care of the consequences of delayed payment (*Overnight Motor Transportation Company* v. *Missel*, 316 U. S. 572) and interest, when allowable as damages, is a remedy to repair the loss of the use of money due resulting from failure to pay on the due date. To allow double damages and interest would be to allow recovery for delayed payment twice.

B. The Court of Appeals erred in holding that interest may be awarded pursuant to the provisions of the New York Civil Practice Act. Congress having occupied the field, state interest statutes are inapplicable. (cf. *Murmann* v. *The N.Y., N.H. & H. R. R. Co.*, 258 N.Y. 447; *Louisiana & Arkansas Railroad Company* v. *Pratt*, 142 F. (2d) 847; *Chicago, Milwaukee, St. Paul & Pacific R. R. Co.* v. *Busby*, 41 F. (2d) 617). That state interest statutes are inapplicable to proceedings under the Act, is particularly clear in view of the detailed provisions of the Act with respect to damages and the evident intent of Congress apparent from the double damage provision that interest not be included. (*Berry et al.* v. *34 Irving Place Corporation*, 8 C.C.H. Labor Cases ¶62, 265 (S.D.N.Y. decided June 16, 1944); *Campbell* v. *Zavelo, supra.*)

ARGUMENT

POINT I

NO PLAINTIFF IS ENTITLED TO RECOVERY ON THE RECORD HEREIN.

A. No Plaintiff Is Entitled to Recover Unless He Was Engaged in Commerce or in Activity so Closely Related to the Movement of Commerce "as to be in Practice and Legal Contemplation a Part of It."[5]

1. *No Plaintiff is Entitled to Recover Unless He Was Himself Engaged In "Commerce" Within the Meaning of that Term, as Used in the Fair Labor Standards Act.*

An employee is entitled to the benefits of overtime compensation under the Fair Labor Standards Act if but only if he, himself, is engaged in interstate commerce or in the production of goods for such commerce.[5] This is unmistakably clear from the language of the Act itself. Section 7 (a) of the Act, upon which the instant claim to recovery is based, provides that

> "No employer shall, except as otherwise provided in this section, employ any of his employees *who is engaged in commerce or in the production of goods for commerce* * * * unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed." (Italics supplied.)

And the decisions of this Court have uniformly stressed that it is the character of the activity of the particular

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[5]The plaintiff does not contend (and there is no basis for contending) that either he or any of the members of the class on whose behalf this suit was brought, was engaged in "the production of goods for commerce" while in your petitioner's employ. The sole question to be considered is whether he or any of such employees was "engaged in commerce" while employed by your petitioner.

employee that determines coverage. Thus, this Court pointed out in *A. B. Kirschbaum Co.* v. *Walling*, 316 U.S. 517 (1942):

> "But the provisions of the Act expressly make its application dependent upon the character of the employees' activities." (p. 524)

Similarly, the recent decision of this Court in *McLeod* v. *Threlkeld*, 319 U.S. 491 (1943), reaffirmed this proposition, this Court saying:

> "It is not important whether the employer, in this case the contractor, is engaged in interstate commerce. It is the work of the employee which is decisive." (p. 497)

2. *No Plaintiff was "Engaged in Commerce" within the Meaning of That Term in the Act Unless His Particular Activity Constituted Commerce or was So Closely Related to the Movement of Commerce "as to be in Practice and in Legal Contemplation a Part of it."*

That no plaintiff was engaged "in commerce" within the meaning of that term in the Fair Labor Standards Act of 1938 unless he would be held to have been employed "in commerce" as that term was used in the Federal Employers' Liability Act (45 U. S. Code §51 et seq.) prior to its recent amendment and that, therefore, no plaintiff was engaged "in commerce" within the meaning of that term in the Fair Labor Standards Act unless his individual activity was in commerce or so closely related to the movement of commerce "as to be in practice and in legal contemplation a part of it" is now firmly established by the decisions of this Court. Thus in *Overstreet* v. *North Shore Corporation*, 318 U. S. 125 (1943), in holding sufficient the allegations of a complaint under the Act which recited that one employee operated a drawbridge on a toll road over which extensive interstate traffic moved, that another employee was engaged "in maintenance and repair work

on the road and the bridge" and that still another employee sold and collected toll tickets from vehicles using said toll road in interstate commerce, this Court said:

> "A practical test of what 'engaged in interstate commerce' means has been evolved in cases arising under the Federal Employers' Liability Act * * *." (p. 128)
>
> "We think *that practical test should govern here.*" (p. 129) (Italics supplied.)
>
> "The Federal Employers' Liability Act and the Fair Labor Standards Act are not strictly analogous, but they are similar. * * * We see no persuasive reason why the scope of employed or engaged 'in commerce' laid down in the *Pedersen*[6] and related cases, cited above, should not be applied to the similar language in the Fair Labor Standards Act, especially when Congress in adopting the phrase 'engaged in commerce' had those Federal Employers' Liability Act cases brought to its attention." (pp. 131-2)

And in applying the test so laid down, this Court emphasized the individual activity of the employees who brought the action, saying:

> "The work of *each petitioner* in providing a means of interstate transportation and communication is so intimately related to interstate commerce 'as to be in practice and in legal contemplation a part of it' (*Pedersen's* case, *supra*), and justifies regarding petitioners as 'engaged in commerce' within the meaning of the Fair Labor Standards Act." (p. 130) (Italics supplied.)

Similarly, but even more precisely, this Court held in *McLeod* v. *Threlkeld*, 319 U.S. 491 (1943), that an employee engaged in work related to the repair of an instrument of commerce was engaged in commerce only if his activity was such that he would be held to have been employed "in

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[6] *Pedersen* v. *Delaware, Lackawanna & Western Railroad Company*, 229 U.S. 146 (1913), not the instant case.

commerce" under the Federal Employers' Liability Act. There this Court said:

> "There is no single concept of interstate commerce which can be applied to every federal statute regulating commerce. See *Kirschbaum Co.* v. *Walling, supra,* 520. However, *the test of the Federal Employers' Liability Act* that activities *so closely related to interstate transportation* as to be in practice and legal relation a part thereof are to be considered in that commerce, *is applicable to employments 'in commerce' under the Fair Labor Standards Act.*" (p. 495) (Italics supplied.)

and further:

> "*The test under this present act,* to determine whether an employee is engaged in commerce, is not whether the employee's activities affect or indirectly relate to interstate commerce but *whether they are actually in or so closely related to the movement of the commerce as to be a part of it.* Employee activities outside of this movement, so far as they are covered by wage-hour regulation, are governed by the other phrase, 'production of goods for commerce.'" (p. 497) (Italics supplied.)

In adopting, in the case of employees engaged in work relating to the repair of an instrumentality of commerce, the test of the closeness of the relation of the particular employee's work to the movement of commerce, this Court gave due recognition to the history and language of the Act. It was obvious, as this Court recognized, that the term "engaged in commerce" did not comprehend activity merely affecting commerce. To have interpreted the term "engaged in commerce" as comprehending activity merely affecting commerce would have been to have ignored the distinction in the Act itself between engagement in "commerce" and engagement in the "production of goods for commerce"; to have ignored the fact that Congress did not incorporate into the Fair Labor Standards Act, the language of the then existing National Labor Relations

Act with regard to activities "affecting commerce"; and to have ignored the legislative history of the Fair Labor Standards Act which shows that coverage of activities "affecting commerce" was considered and rejected. (See *McLeod* v. *Threlkeld, supra,* at p. 493). On the other hand to have construed engagement in "commerce" to include activities which were only "commerce" within the definition in Section 3 of the Act would have resulted in ignoring the closeness of the relation between the words engaged "in commerce" in the Act and the words employed "in commerce" in the Federal Employers' Liability Act which latter language had been brought specifically to the attention of Congress (See *Overstreet* v. *North Shore Corporation, supra,* at p. 132 and footnote (4) on said page). It was only natural, therefore, that this Court should have concluded that, when Congress referred to employees "engaged in commerce", it meant, in the case of employees engaged in work relating to an instrumentality of commerce, to afford coverage to those employees, and only those, who would be held to have been employed "in commerce" under the Federal Employers' Liability Act, that is to employees whose activity was either in commerce or so closely related to the movement of commerce "as to be in practice and in legal contemplation a part of it."

The test of whether any plaintiff was employed "in commerce", as those words were used in the Federal Employers' Liability Act cases (and hence, as shown in the *Overstreet* and *McLeod* decisions the test of whether any plaintiff herein was "engaged in commerce" as those words are used in the Fair Labor Standards Act), is whether the particular employee was employed in such a capacity that his work was in, or had so close and intimate a relation to the movement of commerce as to be a part of it. For, it has been universally held in the Federal Employers' Liability Act cases that, where an employee was engaged

in actual repair work on an instrumentality of commerce (as was alleged in the complaint in the *Overstreet* case and admitted by motion to dismiss) or was engaged in keeping tracks clear for interstate movement, he was employed "in commerce." But where the employee's work was a step or more removed from present transportation activity, the employee was held not to be employed "in commerce" although his work was clearly of importance to the railroad, as in *Shanks* v. *Delaware, Lackawanna & Western Railroad Company*, 239 U. S. 556 (1916)

(wherein an employee was injured while moving a heavy repair shop fixture);

Chicago & North Western Railway Co. v. *Bolle*, 284 U.S. 74 (1931)

(wherein the employee's work was the *generating of steam which was used to heat* various structures and facilities, including bunk *cars for track maintenance and bridge workers*, and was also used *to prevent the freezing of a turntable*);

Chicago & Eastern Illinois Railroad Co. v. *Industrial Commission of Illinois*, 284 U.S. 296 (1932)

(wherein the employee operated a power hoist by means of which coal was lifted into tender supply chutes);

New York, New Haven and Hartford Railroad Co. v. *Bezue*, 284 U. S. 415 (1932)

(wherein an employee was injured while moving locomotive wheels to a roundhouse where they were to be replaced on a locomotive undergoing repairs)

(decisions which are cited with approval in the *Overstreet* and *McLeod* decisions). As stated in the *McLeod* decision with respect to the *Bolle*, *Bezue* and *Commission* cases *(supra)*:

"These three later cases limited the coverage of the Federal Employers' Liability Act to the actual operation of transportation and acts so closely related to transportation as to be themselves really a part of it. They recognized the fact that railroads carried commerce and were thus a part of it but that each employment that indirectly assisted the functioning of that transportation was not a part. *The test under this present act,* to determine whether an employee is engaged in commerce, is not whether the employee's activities affect or indirectly relate to interstate commerce but *whether they are actually in or so closely related to the movement of the commerce as to be a part of it.*" (pp. 496-7) (Italics supplied.)

B. The Record Contains No Evidence That Any Plaintiff Was At Any Time Engaged in Commerce or in Activity so Closely Related to the Movement of Commerce "as to be in Practice and in Legal Contemplation a Part of It."

To be entitled to recovery herein, each plaintiff must, as hereinbefore pointed out, have been engaged, during overtime periods, in work having so close and intimate relationship to the movement of commerce as to be a part of it. Activity which merely affected or indirectly related to the movement of commerce would not warrant recovery.

There is nothing in the record in this proceeding which would warrant a conclusion that any plaintiff (*as distinguished from other employees of your petitioner who are not parties to this proceeding*) at any time did any work for your petitioner having such a close or intimate relationship to the movement of commerce. Nor is there anything to warrant a conclusion that any plaintiff was not engaged in an activity which merely affected or indirectly related to the movement of commerce and which is clearly not within the coverage of the Act. *No plaintiff*

herein has shown the nature and character of the activity in which he was engaged during all or any part of the period of his employment by your petitioner or the closeness of the relation of such activity to the movement of commerce.

The record establishes only that your petitioner entered into a contract with an interstate carrier for the construction of new abutments for two bridges and repair work upon substructures of two other bridges owned by the carrier; that the plaintiffs (*together with others*) were employed by your petitioner in "doing work under the contract"; and that the plaintiffs in fact "worked" for your petitioner. (R. 15-17) The particular work done by any plaintiff at any time nowhere appears in the record. Nothing in the record shows more than that the plaintiffs' work was in relation to a repair project and this was held to be an insufficient showing in the *McLeod* decision. The following are the only pertinent facts of record:

> "That thereafter, the railroad company entered into a contract with the defendant,[7] an independent contractor engaged in general construction work, for the construction of entirely new abutments under the two bridges where the abutments had been washed out and destroyed, as aforesaid, and for repairing the substructures of the other two bridges which had been damaged, as aforesaid."
>
> "*That defendant employed plaintiffs,* together with other individuals, *as its employees in doing work under said contract* and paid them at the rates per hour, as shown on Schedule 'A' annexed to said stipulation of December 1, 1939."
>
> "That after October 24, 1938, until the completion of said work by the defendant under said contract, *each plaintiff worked for the defendant* the number of hours

[7] The term "defendant" as used in these quotations means the petitioner herein.

per week and was paid by the defendant at the hourly rate of pay as shown on Schedule 'A' annexed to said stipulation of December 1, 1939." (Italics supplied) (R. 15-17).

The error, which led the Trial Court to the conclusion that the plaintiffs were entitled to recover, resulted from the assumption that the plaintiffs were entitled to recover if their work was substantially related to repair work and the inference that the work of the plaintiffs was so related. The error in assuming that work substantially related to repair work constitutes engagement in commerce resulted from an improper interpretation of the holding of this Court in the *Overstreet* case and the failure of the Trial Court to apply the test laid down in the Federal Employers' Liability Act cases. The *McLeod* case, decided the day before the Trial Court's opinion was rendered, has made clear that the test of the Federal Employers' Liability Act cases governs, and that under those cases work may be substantially related to repair work (as was the work of the plaintiff in the *McLeod* case) and yet may not be so closely related to the movement of commerce "as to be in practice and in legal contemplation a part of it." Moreover, as nothing appears in the facts as to what any plaintiff did, or as to what all plaintiffs as a group did, the degree of relationship of the plaintiffs' work to the work of repair may not properly be inferred. As Mr. Justice Schenck, in his dissenting opinion in the Appellate Division, has pointed out:

> "The most that can fairly be inferred from the agreed statement of facts is that plaintiffs did work in connection with the construction and repair project on which defendant was engaged, there being nothing in the record to indicate the relationship which the respective tasks of the several plaintiffs bore to the construction and repair work." (R. 56)

It is noteworthy, as will hereinafter be pointed out, that the Court of Appeals did not fall into the error of the Trial Court.

The record affords no basis for applying the Federal Employers' Liability Act test of coverage held applicable to cases under the Fair Labor Standards Act in the *Overstreet* and *McLeod* decisions. Nothing in the record enables a determination as to whether any individual workman was performing work which, however important, was only incidental to, or only preliminary to, or only expedited the actual repair work being performed by other employees, as were the workmen in the cases which denied coverage under the Federal Employers' Liability Act and are cited with approval in the *Overstreet* and *McLeod* decisions. The record affords no answer as to whether any particular plaintiff was at any time engaged in actual repair work on an instrumentality of commerce (as an employee in the *Overstreet* case was admitted to be) or was instead, engaged only, for example,

(a) in setting up or maintaining stationary derricks, platforms and pile drivers,

(b) in oiling or cleaning machinery,

(c) in trucking or unloading supplies to be used when and if needed on the project,

(d) in the repair and sharpening of tools,

(e) in scraping and painting iron work,

(f) in treating wood to be used in forms

or in any one of the many other preliminary or incidental occupations which, in the decisions in and following the *Shanks, Bolle* and *Industrial Commission* cases (*supra*), have been held to be employments which are neither commerce nor so closely related to the movement thereof "as to be in practice and in legal contemplation a part of it".

The record fails even to exclude any plaintiff from that substantial group of employees on any repair or construction project whose duties have absolutely no relation to the progress of the actual construction work but are concerned entirely with the salvage and disposition, solely for the contractor's benefit, of lumber and other materials which cannot further be used on the particular project.

The record shows merely that your petitioner was engaged in a project, certain work in the course of which constitutes "commerce" and certain other work in the course of which does not constitute "commerce" and that the plaintiffs *together with others* did work in connection with such project. The record gives not the slightest hint of what work was done by any plaintiff at any time or whether such work was of the kind constituting commerce or was of the kind not constituting commerce. In effect, the record merely shows the nature of the employer's business and is silent as to the nature of the activity of any plaintiff. It has been repeatedly held by this Court that it is the character of the employee's and not of the employer's activity which is controlling.

The inadequacy of the present record to warrant recovery by any plaintiff has heretofore been noted by this Court. When this proceeding was formerly before this Court, your petitioner, in its petition for rehearing, pointed out that nothing in the record showed either the nature of the activity of any plaintiff or that such activity was so closely related to the movement of commerce as to be a part of it. This Court thereupon amended its mandate in recognition of the fact that the record then before this Court contained no

> ". . . . determination of the nature of the employment of any members of the class on whose behalf this suit has been brought." (R. 30)

The record now before this Court is the same record, in this respect, as the record previously before this Court. The deficiency in the record, so pointedly referred to, has not been cured.

Both the plaintiffs and the Court of Appeals have recognized that the project upon which your petitioner was engaged called for various different activities, some of which if performed by the plaintiffs would constitute engagement in commerce and others of which obviously would not constitute commerce and that the record is silent as to the nature of the activities of the plaintiffs. The Court of Appeals' order amending its remittitur shows clearly its conclusion in this regard, although it erroneously believed (as will hereinafter be pointed out) that the burden of producing evidence as to these employees' activities fell upon your petitioner. The plaintiffs, however, recognize not only the varying characteristics of the work performed upon the project and the silence of the record as to their own activity, but also that the burden of producing evidence with regard to those activities was theirs. The plaintiffs have relied in defense of the Court action below on local procedural grounds which not only are unsound[8] but which have been repudiated by the Court of Appeals in its order amending its remittitur. In their brief filed herein and entitled—Brief in Opposition to Petition for Writ of Certiorari—the plaintiffs stated that:

> "The only issue determined by the State courts, and the only issue presented to this Court, is one of civil procedure. *The petitioner herein could easily have required of the plaintiff* (Pedersen) *proof of the details of each worker's duties*, by merely interposing on the

[8] Rule 113 of the New York Civil Practice Act referred to by the plaintiffs did not require an answering affidavit under the circumstances of the present case.

motion for summary judgment a short answering affidavit." (P. 9) (Italics and parenthetical insertion supplied).

C. The Burden was on the Plaintiffs to Show That They Were Engaged in "Commerce" and They Have Failed to Sustain That Burden. The Court of Appeals Erred in Holding That the Burden of Going Forward with Evidence That the Plaintiffs Were Not So Engaged Shifted to Your Petitioner On the Present Record.

The burden of proving coverage under the Act is on the party asserting coverage. This is the normal rule as to burden of proof and nothing in the Act provides for a shifting of the burden. The Act provides for recovery by employees if they have not received the compensation to which they are entitled and employees are entitled to overtime compensation under the Act only if they were, during the periods for which overtime compensation is claimed, engaged in "commerce" or in the "production of goods for commerce". It is not surprising, therefore, that this Court early held that the burden is on employees seeking recovery under the Act to show that they come within the coverage of the Act. Thus, this Court pointed out in *Warren-Bradshaw Drilling Co.* v. *Hall*, 317 U.S. 88 (1942):

> "The application of the Act depends upon the character of the employees' activities. *Kirschbaum Co.* v. *Walling*, *supra*, p. 524. The burden was therefore upon respondents to prove that, in the course of performing their services for petitioner and without regard to the nature of its business, they were, as its employees, engaged in the production of goods, within the meaning of the Act, *and* that such production was for interstate commerce." (p. 90) (Italics supplied.)

Numerous decisions of other Courts are to the same effect. Thus, in *Super-Cold Southwest Company* v. *McBride*, 124 Fed. (2d) 90 (1941), the Circuit Court of Appeals for the Fifth Circuit held:

> "An employee working both inter-state and intra-state must point out what part of his work was in intra- and what part in inter-state commerce." (p. 92)

Similarly in *Schwarz* v. *Witwer Grocer Co.*, 49 F. Supp. 1003 (N. D. Iowa, 1943) affirmed, 141 Fed. (2d) 341 (C.C.A. 8, 1941), the District Court stated:

> "The weight of authority clearly indicates that when the employee works both in intrastate and interstate commerce, the burden is upon him to point out what part of his work was in intrastate and what part in interstate commerce, and the extent of the interstate work and when performed." (p. 1004)

So also in *Jones* v. *Springfield Missouri Packing Company*, 45 F. Supp. 997 (S.D. Mo., 1942), the Court said:

> "It has been repeatedly held that though the employer may in fact be engaged in interstate commerce, yet this would not entitle an employee to recover except in those cases where his own work was in interstate commerce or the production of goods for interstate commerce." (p. 999)

See accord *Jax Beer Company* v. *Redfern*, 124 F. (2d) 172, 174 (C.C.A. 5, 1941).

The plaintiffs have wholly failed to sustain the burden, which was theirs, of showing that they were engaged in "commerce". The record is wholly barren of evidence as to the activity of any plaintiff at any time or of the closeness of the relation of any plaintiff's activity at any time to the movement of commerce. (See pages 17 to 23 hereof.)

The Court of Appeals erred in holding that the burden of going forward with evidence that the plaintiffs were not engaged in "commerce" became your petitioner's on the present record. As has heretofore been pointed out, the burden of proof was on the plaintiffs and they have wholly failed to sustain that burden. On the record no possible basis existed for shifting the so-called "burden of going forward" to your petitioner. The burden of going forward with evidence does not shift from the party having the burden of proof, until that party has produced sufficient evidence to sustain the burden of proof as a matter of law. Wigmore on Evidence (3rd ed.) §2489. In this proceeding, the plaintiffs have not produced such evidence. The record shows no more than that the plaintiffs *might* or *might not* have been engaged in "commerce". In a project such as that in which your petitioner was engaged, there are obviously many separable activities, some of which (such as actual repair work) if performed by the employees represented by the plaintiff, would constitute engagement in commerce and others of which (such as preliminary, incidental or salvaging work) obviously would not constitute such engagement. Certainly, on a showing that the particular employees, on whose behalf the plaintiff is suing were engaged on a project, separable and identifiable activity in connection with which would necessarily not have been so closely related to commerce as to be a part of it, and without any showing as to the particular activity of any plaintiff in any week or at any time, the plaintiffs have not produced sufficient evidence to sustain their burden of proof as a matter of law, and there is no basis whatsoever for the holding of the Court of Appeals that the burden of going forward shifted to your petitioner. The plaintiffs failed to establish their case and should have been denied relief.

POINT II

INTEREST CANNOT PROPERLY BE ADDED TO STATUTORY DOUBLE DAMAGES IN MAKING AN AWARD TO EMPLOYEES UNDER THE ACT.

A. THE FAIR LABOR STANDARDS ACT OF 1938 PROPERLY CONSTRUED EXCLUDES AN AWARD OF INTEREST.

Not only does the Fair Labor Standards Act contain no provision for the inclusion of interest in a judgment rendered thereunder, but rather, properly construed, it precludes such an award. Employee actions under the Act are provided for in Section 16 (b) thereof, wherein is set forth with particularity detailed provision for the damages recoverable. Section 16 (b) provides in terms as follows:

> "Any employer who violates the provisions of Section 6 or Section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. . . . The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action." (29 U.S. Code §216(b))

Thus section 16 (b) provides that successful plaintiffs shall recover "their unpaid minimum wages, or their unpaid overtime compensation, as the case may be," and "an additional equal amount as liquidated damages." Furthermore, provision is made for the allowance of a "reasonable attorney's fee to be paid by the defendant" and "costs of the action." In view of the circumstance that detailed provision is made for the elements of recoverable damage, including provision for attorney's fees and for costs, it is apparent that the whole subject of recoverable damages is covered by the section. In view of the particularity of the treatment of recoverable damages,

it is apparent that all elements of recoverable damage were intended to be provided for and that the damage provisions are intended to be exclusive. As stated by the Court in *Campbell* v. *Zavelo*, 243 Ala. 361 (1942):

> "In our opinion interest should not be computed on the double payment for overtime work authorized by the Act of Congress. That is to say, the provisions of the Act of Congress are the limits of liability which can be imposed on an employer * * *." (p. 366)

The failure to provide for interest is for an obvious reason and one, which, in and of itself, conclusively demonstrates that interest may not properly be awarded. Interest, when allowed in an action, is allowed as damages for the retention of payments beyond their due date. It is the damages, or part of the damages, a defendant commonly pays for delay. But the Act here has provided for double damages as the remedy for all injury, including the injury of delay. As this Court pointed out, in *Overnight Motor Transportation Company* v. *Missel*, 316 U.S. 572 (1942), the statutory provision for liquidated damages recognizes that,

> "The retention of a workman's pay may well result in damages too obscure and difficult of proof for estimate other than by liquidated damages." (pp. 583-584)

It is obvious that Congress did not intend the unfair result of awarding double damages to take care of all the consequences of delayed payment and then to allow the award of interest, itself the price normally paid for delay, on those double damages. Two remedies for delayed payment are clearly not intended.

It is no answer to say that this Court held in the *Missel* case that the double damages allowed under the Act are compensatory and not a penalty. Interest, when allowable, is compensatory. It compensates for the loss of the

use of money. While double damages are, broadly speaking, compensatory, they are compensatory for all loss suffered as a result of the non-payment, when due, of the wages required by the Act and necessarily include the loss of the use of money for which interest is normally allowable.

B. The Court of Appeals Erred in Holding That Interest May Be Awarded Pursuant to the Provisions of the New York Civil Practice Act.

The Court of Appeals, recognizing that no provision is contained in the Fair Labor Standards Act of 1938 authorizing an award of interest in employee actions under said Act, has held that interest may nevertheless be awarded by virtue of the provisions of a local statute, namely section 480 of the New York Civil Practice Act. (R. 65).

The Court of Appeals erred in holding applicable to actions under the Fair Labor Standards Act the interest provisions of the New York statute. Interest may not be awarded pursuant to a state statute in an action under the Act. Congress has, by its enactment of the Act, as between itself and the State legislature, completely and exclusively occupied the field in the case of employees engaged in "commerce" and in the "production of goods for commerce." Congress has prescribed the standards to be observed and, in detail, the remedies for failure to conform to the required standards. The states may no more add to, than they may detract from, those remedies.

An analogy exists in the decisions under the Federal Employers' Liability Act. In cases under the latter Act it has been consistently held that interest, authorized by state statute, may not be included in a judgment, under the federal act. Thus, in *Murmann* v. *The New York, New*

Haven and Hartford Railroad Company, 258 N.Y. 447 (1932), it was held that the addition of interest, pursuant to a state statute, to a verdict returned under the Federal Employers' Liability Act was improper. In that case the Court pointed out,

> "The Federal legislation covers the whole field, and the power of the States is not broad enough to change the assessment of the damages as determined by the verdict." (p. 450)

The same principle has been consistently recognized in other decisions under the Federal Employers' Liability Act, both prior and subsequent to the *Murmann* decision. Thus, in *Louisiana & Arkansas Railroad Company* v. *Pratt,* 142 F. (2d) 847 (1944), the Circuit Court of Appeals for the Fifth Circuit held that:

> "The item of accrued interest presents a question of substantive law. We think, therefore, that the silence of the federal statute upon the subject of interest may not be construed as leaving the subject unlegislated upon in the Act, but is indicative of the considered purpose that no interest should be allowed in such actions prior to verdict. Since the Act is exclusive, state statutes upon the measure of damages, including Louisiana Act 206 of 1916, are superseded in so far as they are in conflict." (pp. 848-849)

Similarly, in *Chicago, Milwaukee, St. Paul & Pacific Railroad Co.* v. *Busby,* 41 F. (2d) 617 (1930), the Circuit Court of Appeals for the Ninth Circuit held that a Montana statute providing for the payment of interest "was not controlling in actions arising under the Act."

And in *Mobile & Ohio R.R. Co.* v. *Williams,* 219 Ala. 238 (1929), the Court said:

> "Such act is paramount and exclusive, and the defendant's liability cannot be extended by any state statute or rule of construction." (p. 247)

See accord *Bennett* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 187 Iowa 897 (1919).

An even stronger basis exists for holding local interest statutes inapplicable in cases involving the Fair Labor Standards Act. As hereinbefore pointed out, the Fair Labor Standards Act deals in detail with the damages recoverable and an award of interest is not merely not provided for but is inconsistent with the double damage provision thereof. Mr. Justice Schenck so noted in his dissenting opinion in the Appellate Division herein (R. 57) as did Chief Justice Lehman of the Court of Appeals with whom concurred two other Justices. (R. 65). The District Court for the Southern District of New York so held in *Berry et al* v. *34 Irving Place Corporation*, 8 C.C.H. Labor Cases ¶62,265, (decided June 16, 1944) and the Supreme Court of Alabama so held, in *Campbell* v. *Zavelo* (*supra*).

The decision of this Court in *Klaxon Co.* v. *Stentor Co.*, 313 U. S. 487 (1941), relied on by the Court of Appeals, furnishes no support to the majority opinion of that Court. There a local interest statute was properly held applicable in an action for breach of contract, but no claim under a federal statute was involved. Here, unlike in the *Klaxon* case, a federal statute covers the field and by direct implication excludes an award of interest. As pointed out in *Berry* v. *34 Irving Place Corporation* (*supra*):

> "In the instant case jurisdiction is not founded on diversity but upon a Federal right. The Federal legislation which is the basis of the action 'covers the whole field, and the power of the States is not broad enough to change the assessment of the damages . . . .'. *Murmann* v. *N. Y., N.H. & H. R. R. Co.*, 1932, 258 N.Y. 447, 450. The statutory provision of the Fair Labor Standards Act for liquidated damages is designed to compensate for the damages resulting from the retention of the workmen's pay. *Overnight Motor Co.* v. *Missel*, 1942, 316 U. S. 572, 583 [5 Labor Cases p. 51, 145] which

otherwise might be 'too obscure and difficult of proof'. Nothing in the statute suggests anything but a legislative intention to provide a uniform rule as to such damages, a rule in no way dependent upon the varying standards and provisions of the several states."

Respectfully submitted,

HENRY E. FOLEY
Counsel for Petitioner

Dated: January 6, 1945

APPENDIX A.

STATE OF NEW YORK

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany, on the *thirtieth* day of *November*, A. D. *1944*.

PRESENT, HON. IRVING LEHMAN,
Chief Judge, Presiding.

.....

CHRIS PEDERSEN, *ind., and as Agent and Representative for and in behalf of himself and all other Employees of the Defendant similarly situated,*

Respondent,

vs.

J. F. FITZGERALD CONSTRUCTION COMPANY,
Appellant.

.....

A motion to amend the remittitur in the above cause having heretofore been made herein upon the part of the appellant, papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted and the remittitur amended by adding thereto the following:

"Upon this appeal there was presented and necessarily passed upon a question of interpretation of a Federal

statute, the Fair Labor Standards Act of 1938. The decision of this Court that respondents have established their right to recover benefits under said Act is based upon the sole ground that the agreed statement of facts states a prima facie case in that it shows that the respondents were employed in doing work under the appellant's contract for the repair of an instrumentality of commerce, and therefore that the appellant had the burden, which it failed to sustain, of going forward with evidence to show the contrary."

AND the Supreme Court, Columbia County, State of New York, is hereby requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

A copy

RAYMOND J. CANNON
Deputy Clerk.

(SEAL)

APPENDIX B.

Fair Labor Standards Act of 1938 (29 U. S. Code, Sections 201, *et seq.*).

Sec. 3 (b) "'Commerce' means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof" (Sec. 203 [b]).

Sec. 7 (a) "No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce * * * unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed" (Sec. 207 [a]).

Sec. 16 (b) "Any employer who violates the provisions of Section 6 or Section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action" (Sec. 216 [b]).